



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

MAR 14 2005

Bobby R. Burchfield, Esq.
McDermott Will & Emery
600 Thirteenth Street, N.W.
Washington, DC 20005-3096

RE: MUR 5541
U.S. Chamber of Commerce and
Thomas Donahue, President & CEO

Dear Mr. Burchfield:

On October 1, 2004, the Federal Election Commission notified your clients, the U.S. Chamber of Commerce and Thomas Donahue, President & CEO, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, the Commission, on March 8, 2005, found that there is reason to believe your clients, the U.S. Chamber of Commerce and Thomas Donahue, President & CEO, violated 2 U.S.C. § 441b(a) of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is enclosed for your information. Please note that Respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of these matters. Statements should be submitted under oath. All responses to the enclosed Subpoena to Produce Documents and Order to Submit Written Answers in MUR 5541 must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. In the absence of additional information, the Commission may find probable cause to believe that violations have occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter.

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Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Audra Wassom, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

Enclosures
Factual and Legal Analysis
Subpoena and Order

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: U.S. Chamber of Commerce; MUR: 5541
Tom Donohue.

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Citizens for Responsibility and Ethics in Washington ("CREW"). Complainant alleges that the U.S. Chamber of Commerce ("the Chamber") and its president, Tom Donohue, violated the Federal Election Campaign Act of 1971, as amended ("the Act") by making impermissible corporate contributions to The November Fund, a 527 organization that the complaint also alleges is a "political committee" under the Act. The evidence demonstrates that there is reason to believe that the Chamber and Tom Donohue violated the Act by making impermissible corporate contributions. Accordingly, the Commission finds reason to believe that Respondents violated section 441b(a) of the Act.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

The Chamber is an incorporated non-profit trade association that provides various benefits to its members, which include various forms of businesses but principally corporations. The Chamber represents its members before Congress, holds program and networking events, provides litigation support, provides research and issue briefing, and has member discounts.

The November Fund was formed in August of 2004 pursuant to section 527 of the Internal Revenue Code.¹ The group has not registered as a political committee with the Commission, nor is it associated with a registered political committee. The November Fund conducted its activities with nonfederal funds raised outside the limitations and prohibitions of the Act.

Public statements made by individuals with The November Fund and the Chamber indicate that the group was formed in reaction to the selection of Senator John Edwards as the Democratic nominee for Vice President.² The November Fund has provided no explanation for the choice of its name, although its communications reference the Presidential election, which occurred on November 8, 2004. Ken Rietz, Chief Operating Officer of Burson-Marsteller at the time, who founded The November Fund, started the group to "emphasize the need for litigation reform and educate the

¹ Its stated purpose on its Form 8871 is "to engage in political activities that educate the general public regarding the public policy positions of candidates for federal, state, and local office and mobilize voters in compliance with federal and state laws."

² In October, Bill Brock, co-chair of The November Fund, made the following statement: "Kerry's selection of Edwards was such an arrogant act, such an in-your-face thing that we had to do something." Greg Pierce, *Inside Politics*, The Washington Times, Oct. 11, 2004, at A05. And the press, at least, was under the impression that The November Fund intended from its inception to run television ads featuring John Edwards. "Brock's group, which is supported by the pro-business U.S. Chamber of Commerce, said Tuesday it plans to air ads within a month urging legal limits on lawsuit awards and criticizing trial lawyers, including Edwards." Sharon Thelmer, Private groups find loopholes in campaign law, Daily Herald, Aug. 25, 2004, at www.heraldtribune.com; see also, Sharon Thelmer, Non-party groups air hard-hitting ads using exemption from new campaign law, NCTimes.com, Nov. 1, 2004, at www.nctimes.com. A press release issued by The November Fund on August 24, 2004 contained the following statements (emphasis added):

"A new 527 political organization announced today that it will conduct a campaign to 'tell the truth about trial lawyers' including a discussion of John Edwards' legal career."

"Fuller, who served as Chief of Staff to Vice President Bush, said the organization will *focus on key battleground states* and will 'educate voters how much the actions of trial lawyers cost our economy over \$200 Billion a year. The health of our economy is an important issue *in this election.*'"

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public about the positions of officeholders on that subject.” Chamber Resp. at 2. In fact, The November Fund’s 2004 activities were limited to attacking and opposing John Edwards, and his running mate John Kerry, for their positions on tort reform.

The Chamber provided \$3,000,000 to The November Fund between August and October of 2004.³ The Chamber is by far the group’s largest contributor having provided over 95% of The November Fund’s revenues. Suzanne Clark, the Chamber’s Executive Vice-President and Chief Operating Officer, served on The November Fund’s advisory board. The Chamber’s response indicates that she had no “day-to-day responsibilities for [The November Fund’s] operations” however. Chamber Resp. at 4. The Chamber has denied that any of its other officers or employees were involved with The November Fund.

The November Fund sent the Chamber an initial solicitation letter, which did not mention a federal election or federal candidate on August 16, 2004. On August 25th, the day after The November Fund issued a press release that clearly referenced John Edwards and the federal election, the Chamber made its first contribution of \$500,000. It made subsequent contributions totaling \$3 million and issued its own press release entitled “U.S. Chamber Enters Political Debate for Next White House” discussing this “make-or-break election.”⁴ One press report stated:

³ The November Fund appears to have started with an initial \$500,000 contribution from the Chamber on August 25, 2004. The Chamber then made contributions of \$500,000 on September 27, 2004 and \$2,000,000 on October 1, 2004 respectively.

⁴ The August 24th press release stated (emphasis added):

Washington, D.C. – The United States Chamber of Commerce announced it would participate in two new political initiatives to educate voters about the devastating impact

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Chamber president Thomas Donahue had warned Democrats earlier this year that his group would drop its 'customary neutrality' in order to *campaign against Edwards* if he were selected as John Kerry's running mate. The Chamber still does not intend to make an official endorsement, he said, *but will act aggressively through The November Fund to assure Bush's re-election.*⁵

In describing the Chamber's involvement with The November Fund, Tom Donohue, President of the Chamber, said "We are going to run a campaign that says there is a runaway legal system in this country. We have an acute problem here. *If Edwards ends up in the second most important job in the government*, he will influence the

of a runaway legal system on the American way of life —during this fall's presidential campaign.

"We cannot ignore what may prove to be a *make-or-break election* for legal reform at the national level," said Thomas Donohue, Chamber President and CEO. "When voters go to the polls, they need to know lawsuit abuse destroys jobs, drives doctors out of business and forces companies into bankruptcy. The *extraordinary circumstances surrounding this election* have compelled us to support two important new initiatives."

The Chamber is joining others in supporting a new 527 Group called *The November Fund*, which aims to raise public awareness about lawsuit abuse. The group is co-chaired by Craig Fuller, former chief-of-staff to Vice President Bush, and Bill Brock, former Senator and Republican National Committee Chair.

This team has identified seven battleground states where there is the greatest potential to effectively educate voters through a concerted program of TV, radio and print advertising and direct mail, an Internet campaign, and earned media discussing the truth about trial lawyers.

A subsequent *cnn.com*-Inside Politics story from August 25, 2004 reported that "[t]he U.S. Chamber of Commerce plans to run TV ads attacking the former trial attorney [John Edwards] through a new political organization called the November Fund. The ads will run in seven states where polls show a tight race between Kerry and Bush, the chamber said last night in an e-mail statement." John Mercurio, *Still talking swift hosts*, *cnn.com*, Inside Politics, Aug. 25, 2004.

⁵ Douglas Quenqua, US Chamber Helping Form Alliance Critical of Edwards' Law Career, PR Week, Aug. 30, 2004 (emphasis added).

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appointment of at least a thousand people in the government, and he will be a party to naming the next four justices on the Supreme Court."⁶

In a subsequent December 6, 2004 letter to the Chamber's board of directors, Tom Donohue stated (emphasis added):

As for the presidential race, the Chamber did not endorse in the election, but executed a voter education and get-out-the-vote effort, as well as provided significant support to the November Fund because we believed that the prospect of having a trial lawyer a heartbeat away from the presidency would influence our legal, judicial, and regulatory environment for years to come.

The November Fund targeted four states in particular – West Virginia, Iowa, New Mexico, and yes, Ohio. Obviously many factors influence the outcome of a presidential election. I would only note that all four states targeted by the November Fund ended up in the Bush column.⁷

The November Fund has two websites. The first, www.thenovemberfund.org, only contains information about the group and the co-chairs of the group, William Brock and Craig Fuller, and an opportunity to contribute online. At the bottom of that webpage there is a direction to "Visit Our Website: www.thetruthabouttriallawyers.com." It is this second website that contains the group's message and substantive content and is almost entirely focused on criticism of one federal candidate, Senator John Edwards. See Appendix A.

The "Truth About Trial Lawyers" site contains numerous references to the Kerry-Edwards campaign including a history of Edwards' political life and his presidential campaign. The website's clear message is that if Kerry-Edwards are elected the reader

⁶ Alan Murray, Republicans Form '527' Group to Run Anti-Edwards Spots, Wall Street Journal, Aug. 24, 2004, at www.wsj.com (emphasis added).

⁷ <http://www.smartbrief.com/hosted/c100/c100-president-letter.pdf>.

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will not be able to get or afford health care. Furthermore, The November Fund had the following ad on its website:

Warning!!!! John Edwards may be hazardous to your health.

I wish you could know John Edwards the way we know him here in North Carolina. The truth is John Edwards made North Carolina a much more dangerous place to be sick. ... Demand John Edwards tell his friends to stop suing our doctors, abusing our courts and wrecking our economy.

In addition to its website, The November Fund ran internet ads using "pop-up video" attached to the AOL Instant Messenger program.⁸ The pop-up ads ran from September 24th through Election Day, according to The November Fund's spokeswoman, Shelley Hymes.⁹ The internet ads would appear when an AOL Instant Messenger user signed into the program. An image of John Edwards would appear above the user's buddy list, then the video would start in a pop-up window. The video showed John Edwards' face "while a female voice said, 'Personal injury lawyers like John Edwards get rich, but you pay the price.'"¹⁰ At least one of the pop-up ads, "feature[d] a sallow-looking headshot of Democratic vice presidential candidate Sen. John Edwards, gazing across a wall-to-wall field of \$50 and \$100 bills. The text reads, 'Learn the Truth About John Edwards' and offers viewers the chance to click on a link," and that link would take them to The Truth About Trial Lawyers website.¹¹

⁸ So-called "pop-up" ads on the internet are similar to commercials on television and appear without any action having been taken by the user/viewer.

⁹ Leslie Walker, Pop-Up Videos Hit Instant Messengers, Newsbytes News Network, Oct. 31, 2004, at 2004 WL 97512929; Robert MacMillan, Instant Messenger Delivers Political Pop-Ups, washingtonpost.com, Oct. 27, 2004.

¹⁰ Web saturated with campaigning, Chicago Tribune (from Wash. Post), Nov. 2, 2004, at 2004 WL 97455738.

¹¹ Robert MacMillan, Instant Messenger Delivers Political Pop-Ups, washingtonpost.com, Oct. 27, 2004.

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The November Fund also sent out an unknown number of direct mail pieces stating: "Doctors are leaving, hospitals are closing, health care costs are skyrocketing at an alarming rate. ... Tell Sen. Kerry and Sen. Edwards that it is time to support common-sense lawsuit-abuse reform."¹²

B. Analysis

It appears that the \$3 million the Chamber provided to The November Fund may constitute a prohibited corporate contribution and expenditures made for the purpose of influencing a federal election. Accordingly, the Commission finds reason to believe the Chamber and Tom Donohue violated the Act by making prohibited corporate contributions. 2 U.S.C. §§ 441b(a).

¹² Greg Pierce, *Inside Politics*, The Washington Times, Oct. 11, 2004, at A05; *see also Democratic VP hopeful takes spotlight in US presidential race*, Agence France Presse, Oct. 10, 2004, at 2004 WL 95429127.

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